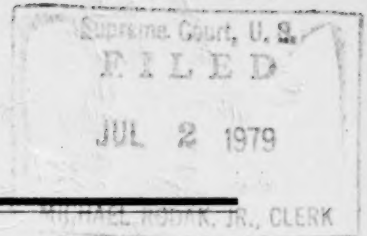


No. 78-1670



In the Supreme Court of the United States

OCTOBER TERM, 1978

JAMES M. MILLEN, PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT**

**BRIEF FOR THE UNITED STATES
IN OPPOSITION**

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 17-24) is reported at 594 F. 2d 1085.

JURISDICTION

The judgment of the court of appeals was entered on February 27, 1979. A petition for rehearing was denied on April 4, 1979 (Pet. App. 25). The petition for a writ of certiorari was filed on May 4, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the indictment failed to state an offense under 21 U.S.C. 841(a)(1) because it charged petitioner, a physician, with unlawfully "distributing," rather than "dispensing," a controlled substance.

(1)

2. Whether prosecutorial misconduct deprived petitioner of a fair trial.

STATUTES INVOLVED

1. 21 U.S.C. 802 provides in part:

As used in this subchapter:

* * * * *

(10) The term "dispense" means to deliver a controlled substance to an ultimate user or research subject by, or pursuant to the lawful order of, a practitioner, including the prescribing and administering of a controlled substance and the packaging, labeling, or compounding necessary to prepare the substance for such delivery. The term "dispenser" means a practitioner who so delivers a controlled substance to an ultimate user or research subject.

(11) The term "distribute" means to deliver (other than by administering or dispensing) a controlled substance. The term "distributor" means a person who so delivers a controlled substance.

* * * * *

(20) The term "practitioner" means a physician, dentist, veterinarian, scientific investigator, pharmacy, hospital, or other person licensed, registered, or otherwise permitted, by the United States or the jurisdiction in which he practices or does research, to distribute, dispense, conduct research with respect to, administer, or use in teaching or chemical analysis.

a controlled substance in the course of professional practice or research.

* * * * *

2. 21 U.S.C. 841 provides in pertinent part:

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance * * *.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Kentucky, petitioner was convicted on 20 counts of unlawful distribution of Demerol, a controlled substance, in violation of 21 U.S.C. 841(a)(1) (Counts 2-7, 9-18, 20, 22, 24, 25), and one count of involuntary manslaughter, in violation of 18 U.S.C. 1112 (Count 1).¹ He was sentenced to concurrent terms of five years' imprisonment on each of the illegal distribution counts and three years' imprisonment on the involuntary manslaughter count. The court of appeals affirmed the illegal distribution convictions. The court vacated the conviction for involuntary manslaughter, however, and remanded for a new trial on that count (Pet. App. 17-24).²

¹The district court dismissed Count 19 of the indictment, and the jury was unable to reach a verdict as to Counts 8, 21 and 23.

²The court of appeals vacated the conviction on the manslaughter count because it concluded that the district court had erred in submitting the issue of second degree murder with malice aforethought to the jury and that this error prejudiced the jury's consideration of the charge of voluntary manslaughter (Pet. App. 21-22). The court also relied on the fact that the prosecutor had attempted to establish that there was a homosexual relationship between petitioner and the victim without first showing a need for that evidence. *Id.* at 23.

The evidence adduced at trial showed that petitioner, a physician with a medical practice in Bardstown, Kentucky, began prescribing Demerol for Bruce Howell in February 1977 (III Tr. 178-179). Between March 23, 1977, and April 29, 1977, petitioner wrote six prescriptions for a total of 158 tablets of Demerol for Howell.³ Occasionally, after writing a prescription for Demerol, petitioner would give Howell the money to pay for it (I Tr. 119-120, 155-156). After dissolving the Demerol tablets in water, petitioner or Howell would inject the solution in the other's veins (I Tr. 142-143, 166-167).

On April 29, 1977, Howell, suffering the effects of a growing dependency on Demerol, was admitted for treatment at the Fort Knox Alcohol and Drug Rehabilitation Center. He remained a patient in the drug rehabilitation program until August 1, 1977, when he was transferred to a hospital at Fort Gordon, Georgia. While Howell was under treatment at Fort Knox, petitioner wrote Howell 14 more prescriptions for 593 Demerol tablets (II Tr. 71-74).⁴

Following Howell's discharge from the Fort Gordon hospital, petitioner wrote four more prescriptions for 172 Demerol tablets for Howell between August 13 and 16, 1977.⁵ As with the other prescriptions, Howell and petitioner would crush the Demerol tablets, mix water with the powder, and give themselves intravenous injections (II Tr. 167-172). In the early morning hours of August 17, 1977, petitioner, who apparently had been sleeping at Howell's residence, notified the authorities of

³These prescriptions formed the basis for Counts 2 through 7.

⁴These prescriptions formed the basis for Counts 8 through 21.

⁵These prescriptions formed the basis for Counts 22 through 25.

Howell's death (I Tr. 17-19, 43-44). The results of an autopsy indicated that Howell died of an overdose of Demerol (I Tr. 178-180).

Testifying in his own behalf, petitioner admitted that he had written some of the prescriptions that were introduced into evidence. He claimed, however, that he had not known that Howell had been using the drugs for improper purposes (IV Tr. 21-25; III Tr. 185-186).

ARGUMENT

I. Petitioner argues (Pet. 6-8) that a physician (or other "practitioner") may be indicted under 21 U.S.C. 841(a) only for unlawful "dispensing" of drugs and not for unlawful "distributing." This contention is insubstantial.

The term "dispense" under the Controlled Substances Act means to deliver a controlled substance "to an ultimate user * * * by, or pursuant to the *lawful* order of, a practitioner * * *" (21 U.S.C. 802(10); emphasis supplied).⁶ Dispensing is lawful under the Act only when done by a practitioner "in the course of professional practice." See 21 U.S.C. 802(20); *United States v. Moore*, 423 U.S. 122, 131-133 (1975). Several courts have correctly concluded that a physician who prescribes or administers drugs other than for a professional purpose is not "dispensing" drugs within the meaning of the Act; instead, he is engaged in the unlawful distribution of drugs, which is defined by the Act to mean the delivery of a controlled substance "other than by administering or dispensing" (21 U.S.C. 802(11)). *United States v. Fellman*, 549 F. 2d 181, 182 (10th Cir. 1977); *United States v.*

⁶A "practitioner" is defined as "a physician * * * licensed, registered, or otherwise permitted * * * to * * * dispense * * * in the course of professional practice * * *" (21 U.S.C. 802(20); emphasis added).

Ellzey, 527 F. 2d 1306, 1308 (6th Cir. 1976); *United States v. Rosenberg*, 515 F. 2d 190, 193 (9th Cir.), cert. denied, 423 U.S. 1031 (1975); *United States v. Black*, 512 F. 2d 864, 866-867 (9th Cir. 1975); *United States v. Green*, 511 F. 2d 1062, 1066-1068 (7th Cir.), cert. denied, 423 U.S. 1031 (1975); *United States v. Badia*, 490 F. 2d 296, 298-299 (1st Cir. 1973).⁷

Petitioner asserts (Pet. 7) that the decision in this case is in conflict with *United States v. Leigh*, 487 F. 2d 206 (5th Cir. 1973). In *Leigh* the court dismissed an indictment charging that the defendant, a physician, had knowingly distributed a controlled substance to a patient. As the same court explained in *United States v. Miranda*, 494 F. 2d 783, 786 (5th Cir.), cert. denied, 419 U.S. 966 (1974), the defect in the indictment in *Leigh* was that it failed to charge any illegal conduct:

By identifying Leigh as a medical doctor, the indictment placed him with a class of persons who are registered to dispense controlled substances as a matter of right. * * * By further averring that a prescription was used to distribute the controlled substance, the activity alleged on the face of the

⁷As the First Circuit explained in *United States v. Badia*, *supra*, 490 F. 2d at 298 n.4:

We think the reason Congress included the term "dispense" in §841(a)(1) was to compel physicians to become properly licensed. If not licensed, a physician could then be convicted of unlawful dispensing. However, once licensed, he could not be convicted of unlawful dispensing because * * * the statute defines the term in and of itself as a lawful act.

In *United States v. Moore*, *supra*, the defendant physician was prosecuted for both unlawful distributing and dispensing of controlled substances. As the Tenth Circuit stated in *United States v. Fellman*, *supra*, 549 F. 2d at 182-183, this Court's opinion in *Moore* "leaves little, if any, doubt that physicians may be prosecuted for both unlawful dispensing and distributing when their activities go beyond the usual course of professional practice" (emphasis by the court).

indictment could be legal. * * * The indictment was dismissed because it did not allege that the act of distribution was unlawful.

Here, by contrast, the indictment specified that petitioner had engaged in the unlawful distribution of a controlled substance by acting outside the usual course of professional practice in issuing orders purporting to be prescriptions (C.A. App. 5a-17a). The decision in this case is therefore not in conflict with *Leigh*.

2. Petitioner contends (Pet. 8-14) that he was deprived of a fair trial by three instances of alleged prosecutorial misconduct.

a. Petitioner first argues (Pet. 8-10) that the prosecutor engaged in prejudicial misconduct when he failed to comply with a pretrial order directing him to furnish certain items to petitioner.

The district court issued an order prior to trial directing the government to disclose all documents and physical objects intended to be used as exhibits at trial. Pursuant to this order, petitioner was given access to most of the government's exhibits prior to trial. In a number of instances, however, the government did not furnish exhibits until the eve of trial or until trial had begun. But, in each of these instances, petitioner's counsel objected, and the district court refused to admit the evidence until defense counsel had had an opportunity to examine the document and to prepare adequately for cross-examination (Pet. App. 20). Petitioner has not demonstrated any prejudice from this delay that deprived him of a fair trial.

b. Petitioner argues (Pet. 10-11) that he was prejudiced when the prosecutor failed to comply with a pretrial order directing him to inform petitioner of any agreements between the government and its witnesses that could

conceivably influence their testimony. Petitioner claims that the government violated this disclosure order by failing to inform petitioner of its agreement not to prosecute Taylor Linkfield, who testified at trial that he had used Demerol with Howell and petitioner and that the Demerol they used was obtained with prescriptions written by petitioner (II Tr. 165-172).

During trial, but before Linkfield testified, the prosecutor released the transcript of Linkfield's grand jury testimony to petitioner. This transcript showed that Linkfield had been advised before the grand jury that, in return for his testimony, he would not be prosecuted in connection with the offenses charged against petitioner. Since petitioner was thus informed before Linkfield testified at trial that the government had agreed not to prosecute him, and since petitioner thoroughly cross-examined Linkfield about this agreement at trial (II Tr. 167, 179-180), petitioner was not prejudiced by any failure to reveal earlier the assurances given to Linkfield.

c. Finally, petitioner argues (Pet. 11-13) that the prosecutor engaged in prejudicial misconduct by eliciting from a witness the fact that there was a homosexual relationship between petitioner and Howell. When this matter was first mentioned at trial, petitioner objected (II Tr. 197), and the prosecutor explained to the court that evidence of the relationship was necessary to establish petitioner's motive for providing Demerol tablets to Howell (II Tr. 198). The judge sustained the objection without any explanation and instructed the jury not to consider the witness's response (*ibid.*). The court of appeals concluded that the elicitation of petitioner's homosexual relationship with Howell was improper because the government failed to demonstrate how it was probative of petitioner's guilt; the court stated that in

these circumstances the prejudicial aspects of the evidence outweighed its probative value (Pet. App. 23). The court nevertheless affirmed the convictions on the drug counts because of "the overwhelming nature of the proofs as to those offenses." *Id.* at 23-24.

The court of appeals' disposition of this issue was proper. The claimed prosecutorial misconduct was not "so prejudicial as to deprive petitioner of a fair trial." *New York Central R.R. v. Johnson*, 279 U.S. 310, 316 (1929). It is well established that "whether improper conduct of Government counsel amounts to prejudicial error depends, in good part, on the relative strength of the Government's evidence of guilt." *Jones v. United States*, 338 F. 2d 553, 554 n.3 (D.C. Cir. 1964).⁸ The evidence showing petitioner's guilt on the drug charges was overwhelming, and the brief reference to the homosexual relationship, which the jury was immediately instructed to ignore, was harmless beyond a reasonable doubt (Pet. App. 23-25). See *Chapman v. California*, 386 U.S. 18, 23-24 (1967).

⁸Thus, the court of appeals noted in this case that the proof of involuntary manslaughter was "tenuous" (Pet. App. 24) and that the prosecutorial misconduct may have been prejudicial as to that count. The evidence on the drug charges, however, was "overwhelming" (Pet. App. 23) and "as to these counts, the prosecutorial abuse * * * was harmless beyond reasonable doubt" (Pet. App. 25, amending Pet. App. 24).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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